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COUNTY OF LOS ANGELES and SERGEANT TRAVIS KELLY
(Defendants is exempt from filing fees pursuant to Government Code § 6103)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOSHUA ASSIFF,

Plaintiffs,

v.

COUNTY OF LOS ANGELES;
SHERIFF DEPUTY BADGE
NUMBER 404532; And DOES 1
through 10,

Defendants.

Case No.: 2:22-cv-05367 RGK(MAAX)

**OPPOSITION TO PLAINTIFF'S
MOTION IN LIMINE NO.1 FOR ISSUE
AND EVIDENCE SANCTIONS FOR
FAILURE TO PRODUCE WITNESSES
FOR DEPOSITION**

Action Filed: August 3, 2022
Pretrial Conference: July 10, 2023
Trial Date: July 25, 2023

Assigned to:
Hon. R. Gary Klausner, District Judge
Courtroom 850

All Discovery Matters Referred to:
Hon. Maria A. Audero, District Judge

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Defendants COUNTY OF LOS ANGELES hereby respectfully submits the
following Opposition to Plaintiff's Motion in Limine No. 1.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff continues to misrepresent the following to this Court: 1) that Plaintiff properly noticed the deposition of the persons most knowledgeable at COUNTY OF LOS ANGELES about 9 certain relevant topics for April 26, 2023 (See Plaintiff's Motion in Limine No.1 at p. 4, 23-25); and 2) that "Defendants have not complied with their discovery obligations." (See Plaintiff's Motion in Limine No.1 at p. 4, 21). The truth is that Plaintiff did not properly notice the deposition of the persons most knowledgeable at the County of Los Angeles ("COLA") – he did not meet and confer with Defendants to request the deponents' availability and he further violated FRCP 30(b)(6) by failing to "confer in good faith about the matters for examination," either before or promptly after the notice was served.

Moreover, in a Stipulation filed with this Court on April 5, 2023, Plaintiff's counsel admitted by signature that he unilaterally set notices for the Depositions of COLA to occur on April 26, 2023. [See Docket #41.] Further, Plaintiff's counsel has not been cooperative or accommodating with respect to the discovery limitations, as indicated by the fact that he proceeded with a non-appearance of COLA, despite having knowledge of the objection to the deposition and confirmation from defense counsel that the deposition would need to be rescheduled.

On November 7, 2022, this Court set a Jury Trial to proceed on July 25, 2023, at 9:00 a.m., and a Pretrial Conference for July 10, 2023, at 9:00 a.m. (Gupta Decl., ¶ 4; see Docket #23.) On the same date, the Court set a motion cut-off date of May 10, 2023, and a discovery cut-off date of April 26, 2023. (Gupta Decl., ¶ 4; see Docket #23.)

On March 31, 2023, without first inquiring as to the parties' availability, Plaintiff served notices for the depositions of COLA's person most knowledgeable ("PMK") for April 26, 2023. (Gupta Decl., ¶ 5.) Plaintiff had not previously noticed these depositions or requested the availability of these parties for a deposition; these depositions were set

1 unilaterally. (Gupta Decl., ¶ 5.) Moreover, Plaintiff failed to comply with FRCP
2 30(b)(6), as he did not “confer in good faith about the matters for examination,” either
3 before or promptly after the notice was served. (Gupta Decl., ¶ 5.)

4 On April 5, 2023, the parties filed a Joint Stipulation to extend pre-trial deadlines,
5 and a proposed order. (Gupta Decl., ¶ 6; *see* Docket #41.) Therein, Plaintiff’s counsel
6 admitted that he unilaterally set notices for the Depositions of COLA to occur on April
7 26, 2023. (Gupta Decl., ¶ 6; *see* Docket #41.) On April 17, 2023, Defendant served
8 objections to Plaintiff’s notice for the deposition of the COLA’s PMK based upon
9 unavailability. (Gupta Decl., ¶ 7.)

10 As demonstrated above, Plaintiff’s counsel waited almost 7 months after filing this
11 action, and almost 5 months after Trial setting, to schedule Defendant’s depositions.
12 Moreover, Plaintiff never once conferred with opposing counsel for the deponents’
13 availability or the subject matter of the entity deposition, as required by the Federal
14 Rules of Civil Procedure. Then, upon receipt of both timely formal objections and
15 notification from counsel as to the unavailability of the deponents on the noticed dates,
16 Plaintiff proceeded with a non-appearance anyway.

17 On May 28, 2023, Plaintiff filed an Ex-Parte Application to Continue Hearing on
18 Motion for Partial Summary Judgment. A basis of Plaintiff’s Ex-Parte motion included
19 that COLA “had not offered a workable mutually agreeable date for the deposition...”.
20 However, as stated in Defendant’s opposition to Plaintiff’s Ex-Parte, Defendants have
21 offered Plaintiff various dates for the depositions of COLA’s PMK as to 8 of the 9
22 enumerated categories, and maintained its timely objection to the final (9th) category
23 enumerated by Plaintiff. (Gupta Decl., ¶ 8.) The witnesses have been prepared to
24 proceed, but Plaintiff’s counsel has declined to proceed with the depositions. (Gupta
25 Decl., ¶ 8.)

26 On May 18, 2023, Plaintiff’s counsel wrote to Defendants’ counsel to
27 communicate the intent not to proceed with the depositions of COLA’s PMK unless each
28 of the various witnesses are all made available on the same date. (Gupta Decl., ¶ 9.)

1 Moreover, Plaintiff's counsel hinted that he did not want to proceed with these
2 depositions until after the scheduled Mediation on June 2, 2023. (Gupta Decl., ¶ 9.)

3 On June 23, 2023, Plaintiff's Counsel wrote to Defendant stating that "we are still
4 waiting for your office for dates for the deposition of the County Representative".
5 (Gupta Decl., ¶ 10.)

6 On June 23, 2023, Defendant responded stating that Plaintiff's unreasonable and
7 arbitrary restriction to perform all PMK Depositions on one day was not possible, and
8 deposition dates had already been provided many times. (Gupta Decl., ¶ 10.)

9 Despite being the cause of the purported discovery issues, Plaintiff now brings this
10 motion in an attempt to remedy the outcome of his own lack of diligence.

11 II. LEGAL ARGUMENT

12 a. Plaintiff's Motion in *Limine* No. 1 is Moot

13 As a threshold matter, Plaintiff's Motion in *Limine* No. 1, must be denied as it is
14 moot. On June 30, 2023, the Court issued a ruling on Defendants' Motion for Summary
15 Judgment. In the Court's ruling, all claims against the COLA Defendant were dismissed
16 with prejudice. [*See* Docket #83]. Given that there are no active claims against the
17 COLA Defendant the subject motion is moot and must be denied.

18 b. Plaintiff Cannot Seek any Relief Associated with Improper 19 Discovery Efforts Which Failed to Comply with the FRCP

20 Plaintiff's Motion in *Limine* No. 1 must be denied as it fails to provide any factual
21 or legal basis to exclude the nine categories of evidence. Plaintiff bases his motion
22 solely on FRCP 37(d)(1)(A)(i), which states, in relevant part, that a party's failure to
23 appear for deposition may be subject to sanctions if that party or party's officer fails to
24 appear for deposition.

25 As noted above, COLA's PMK did not fail to appear for deposition. The noticed
26 deposition for the COLA's PMK was unilaterally noticed by Plaintiff. The notice was
27 improper; Plaintiff failed to comply with FRCP 30(b)(6), as he did not "confer in good
28 faith about the matters for examination," either before or promptly after the notice was

1 served. Defendant properly served objections to Plaintiff's notices for the deposition of
2 COLA's PMK based upon unavailability. Despite Defendant providing alternative
3 dates, to date, Plaintiff has not re-noticed the deposition of the COLA's PMK.

4 **a. The Subject Motion in Limine is Improper**

5 Motions in limine allow parties to resolve evidentiary disputes ahead of trial
6 before attempted use of the evidence before the jury. *Ochoa v. Cnty. of Kern*, 2022 WL
7 4280157 (E.D. Cal. Sept. 15, 2022). The court will bar use of the evidence in question
8 on a motion in limine only if the moving party establishes that the evidence clearly is
9 not admissible for any valid purpose. *Id.*

10 Plaintiff has brought this instant motion not to resolve evidentiary disputes, but to
11 remedy the consequences of Plaintiff's own conduct. Plaintiff has failed to provide any
12 legal basis to establish that the nine categories of evidence are not admissible for any
13 valid purpose.

14 **b. Evidentiary Sanctions Would be Improper**

15 In place of bringing forth a properly noticed discovery motion, Plaintiff attempts
16 to obtain a discovery order and seek sanctions against Defendant through his Motion in
17 Limine No. 1. Plaintiff's sanction request appears to be on the basis that Defendant
18 allegedly suppressed evidence as a result of the purported failure of the COLA's PMK
19 to appear for deposition. However, as noted above, Plaintiff unilaterally noticed
20 COLA's PMK deposition, and Defendant properly served objections to Plaintiff's
21 notice for the deposition. Despite Defendant providing alternative dates, to date,
22 Plaintiff has not re-noticed the deposition of COLA's PMK.

23 Prior to serving an organization a deposition notice, the party must confer in good
24 faith about the matters for examination. *Fed. R. Civ. P. 30*. However, on March 31,
25 2023, Plaintiff served noticed for Deposition of COLA's PMK with no prior effort to
26 meet and confer on the topics of examination or the availability of the PMK prior to
27 issuing notice. Defendant served a formal objection to the deposition of COLA's PMK.

1 However, despite the timely formal objection, Plaintiff proceeded with taking a non-
2 appearance.

3 Plaintiff argues that “A party who fails to appear for deposition is subject to
4 sanctions even in the absence of a prior order. [See, FRCP 37(d)(1)(A)(i); *Henry v. Gill*
5 *Industries, Inc.*, (9th Cir. 1993) 983 Fed.2d 943, 947; *Hilao v. Estate of Marcos* (9th Cir.
6 1996) 103 Fed.3d 762, 764-765]”. (See Plaintiff’s Motion in Limine No.1 at p. 5, 27-
7 28, p. 6, 1-2.)

8 However, the Court in *Henry* found that a failure to appear occurred when a party
9 “twice notified defendants the business day before his properly noticed depositions were
10 to have taken place that he would not attend...” *Henry v. Gill Industries, Inc.*, 983 F.2d
11 943, 947 (9th Cir. 1993). Unlike the issues presented in *Henry*, Plaintiff has never
12 properly noticed the deposition of COLA’s PMK, as no attempt to meet and confer on
13 the topics of the deposition were made. Further, unlike *Henry*, Defendant did not
14 informally cancel on the eve of deposition, but rather properly served Plaintiff with an
15 objection to the deposition nine days prior to the unilaterally selected deposition notice
16 date.

17 Plaintiff cites a second circuit case stating that “an adverse inference instruction is
18 proper in some cases even if the discovery violation was merely negligent, rather than
19 intentional. [*Residential Funding Corp. v. DeGeorge Fin’l Corp.*, supra, 306 Fed.3d at
20 107]. (See Plaintiff’s Motion in Limine No.1 at p. 6, 12-15)

21 However, the Court in *Residential Funding Corp.* discusses that an adverse
22 inference should be available for negligent destruction of documents. *Residential*
23 *Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002). To date,
24 Plaintiff has not made any allegation that evidence has been destroyed by Defendant.
25 Defendant, reluctantly, must repeat that Plaintiff improperly noticed the deposition of
26 COLA’s PMK. Further, despite being provided available dates for COLA’s PMK
27 deposition, Plaintiff has refused to notice the deposition for a date on which COLA’s
28 PMK(s) are available. Plaintiff’s intentional delay in discovery, is his own doing and

1 Plaintiff has consistently thwarted Defendants' efforts to correct Plaintiff's lack of
2 diligence.

3 **c. Plaintiff's Motion in *Limine* No. 1 Was Submitted Past the Court's**
4 **Deadline**

5 Plaintiff's Motion in *Limine* No. 1 must be denied as it was filed beyond the
6 Court's deadline. Per the Court's Order regarding Jury/Court Trial, any Motions in
7 *Limine* must be filed and served at "a minimum of forty-five (45) days prior to the
8 scheduled trial date." [See Docket #24 at p. 4, 6-7] The deadline to file Motions in
9 *Limine* was June 10, 2023. However, despite this deadline, Plaintiff filed Motion in
10 *Limine* No. 1 on June 12, 2023. On this basis, the Court should deny Plaintiff's Motion
11 in *Limine* No. 1.

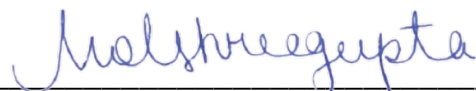
12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiff's Motion in *Limine* No. 1 for issue and
14 evidence sanctions for failure to produce witnesses for deposition should be denied.

15
16 Dated: June 30, 2023

KJAR, MCKENNA & STOCKALPER, LLP

17
18
19 By:



PATRICK E. STOCKALPER

MOLSHREE GUPTA

Attorneys for Defendants,

COUNTY OF LOS ANGELES and SERGEANT
22 TRAVIS KELLY
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27
28

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 841 Apollo Street, Suite 100, El Segundo, California 90245.

On June 30, 2023, I served the foregoing document described as **OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO.1 FOR ISSUE AND EVIDENCE SANCTIONS FOR FAILURE TO PRODUCE WITNESSES FOR DEPOSITION** on all interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

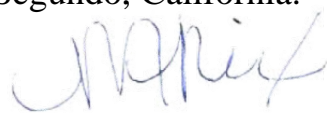
By Mail I caused such envelope(s) to be deposited in the mail at El Segundo, California. The envelope was mailed with postage thereon fully prepaid and addressed to the parties listed on the Service List. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

XX **By Email** Based upon a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed in the Service List. My email address is mnixon@kmslegal.com.

By Personal Service I caused such document to be Personally Served on the parties listed in the Service List.

XX **State** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 30, 2023, at El Segundo, California.



Maria Nixon

SERVICE LIST

Assiff, Joshua vs. County of Los Angeles, et al.

Central District- Case No.: 2:22-cv-05367 RGK(MAAX)

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